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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND MORENO,

Defendant and Appellant.

D073234

(Super. Ct. No. SCN363922)

APPEAL from a judgment of the Superior Court of San Diego County,
Harry M. Elias, Judge. Conviction affirmed; remanded for resentencing.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for
Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Robin H. Urbanski and Kristen
Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Raymond Moreno appeals from a judgment of conviction. A jury convicted Moreno of a single count of corporal injury to a spouse, and found true the allegations that in committing the offense, Moreno caused great bodily injury and used a deadly or dangerous weapon. The jury concluded that Moreno had stabbed his wife, E.R.

On appeal, Moreno contends that there is insufficient evidence in the record to support his conviction. Specifically, he asserts that the evidence presented at trial was insufficient to establish that he is the person who stabbed E.R. on the night in question.¹

Moreno also contends that the trial court failed to understand that it had the discretion to strike one or both of the nonmandatory enhancements.

In addition, after this appeal was fully briefed, Moreno requested leave to file a supplemental brief to argue that, pursuant to Senate Bill No. 1393 (2017–2018 Reg. Sess.) (S.B. 1393), he is entitled to remand for resentencing to allow the trial court to exercise its discretion to strike the five-year prior serious felony enhancement that the court had imposed as a mandatory additional term at the time of his sentencing. S.B. 1393 amends sections 667, subdivision (a) and 1385, subdivision (b), effective January 1, 2019, to give trial courts discretion to dismiss or strike a prior serious felony conviction. We granted Moreno's request to file his supplemental brief and allowed the People to respond to Moreno's argument with respect to S.B. 1393.

¹ At trial, E.R. testified that a group of unknown "girls" stabbed her outside of the apartment that night.

We conclude that Moreno has not demonstrated error on appeal with respect to his first two arguments. However, the People concede that Moreno is entitled to have the court resentence him in order to provide the court with the opportunity to exercise its discretion with respect to Moreno's five-year prior serious felony enhancement. We accept the People's concession. We therefore affirm the judgment of conviction, but vacate Moreno's sentence and remand for the trial court to exercise its discretion regarding whether to dismiss or strike the prior serious felony enhancement.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *D.C.'s testimony*

At the time of the relevant events, D.C. lived in a two-bedroom apartment in Escondido with her mother and four-year-old son. The apartment was about 800 square feet in size. Inside the front door, to the right, there was a patio with a sliding glass door and, to the left, a kitchen and dining room. The view from the patio was to a grass area and a carport. Straight ahead was a hallway leading to two bedrooms that shared a bathroom.

In August 2016, D.C. rented one of the bedrooms in the apartment to E.R. E.R. had been living in the apartment for about four days before her husband, Moreno, moved in. E.R. and Moreno argued often. D.C. did not like having Moreno living in the apartment because of the constant arguing.

On September 5, 2016, E.R. told Moreno that he had to move out of the apartment. E.R. asked D.C. not to let Moreno back into the apartment and to call her if D.C. saw him. The following day, Moreno showed up at the apartment before E.R. returned home from work. D.C. called E.R. to let her know that Moreno was at the apartment. E.R. returned home after work and spoke with Moreno. They left the apartment together and returned approximately one hour later. E.R. made dinner and ate with Moreno at the dining room table. They both appeared to be in a good mood and seemed to be getting along. After eating, the two went into E.R.'s room and shut the door.

Later that evening, D.C. was in her bedroom, her mother was sitting outside on the patio, and her son was running back and forth between D.C.'s bedroom and the patio. At approximately 8:00 p.m., D.C. heard arguing, and then heard E.R. yell, "Ow, Raymond," followed by a thump against the wall. D.C. was scared; she called the police and reported the fighting. D.C. also called her stepfather to tell him what she had heard. Eventually, D.C. did not hear anything else from E.R.'s bedroom, so she called the police back and told them not to come.

At some point after all of this occurred, D.C. was in the bathroom bathing her son. She had left the bathroom door open. She saw Moreno leave E.R.'s bedroom and begin to pace between the room and the patio. D.C. thought that Moreno was acting strangely and seemed paranoid.

D.C. heard E.R. call out for Moreno from the bedroom; D.C. thought that E.R. sounded "like she was in pain." D.C. saw Moreno return to E.R.'s bedroom. "At some point" D.C. went into E.R.'s bedroom to check to see whether she was "okay"; Moreno

was not in the room at that point. D.C. asked E.R. if she was "fine," and E.R. responded, "No." At that point, D.C. saw blood on E.R.'s shirt.

D.C. asked E.R. whether Moreno had stabbed her, and E.R. responded, "Yeah."² D.C. said that she was going to call the police. E.R. told her not to call the police and to leave before Moreno returned. E.R. made no mention of a "fight with some girls," nor did she mention during this conversation anything about an altercation occurring outside of the apartment.

D.C., her mother, and her son left the apartment. D.C. called the police from inside her car. She told the dispatcher that E.R. had said, "He stabbed me."

D.C. was certain that E.R. had not left the apartment during the time between when E.R. and Moreno went into the bedroom after eating dinner and the time when D.C. went to check on E.R. and found her with stab wounds. D.C. never heard an altercation occurring outside the apartment that night, even though the patio door had been open. There was blood and there were blood-covered tissues on the floor of E.R.'s bedroom; although there was also a little bit of blood by the dining room and kitchen, the majority of blood that was found in the apartment was found in E.R.'s bedroom.

2. E.R.'s trial testimony

E.R. testified that during the time she lived with D.C., she and Moreno argued about infidelity after she saw some text messages on his phone that made her think that he was cheating on her. She eventually "kicked Mr. Moreno out of the home."

² At trial, D.C. acknowledged that she had made prior statements to the effect that she had asked E.R. what had happened, and that E.R. had said, "He stabbed me."

According to E.R., she had dinner with Moreno on the night of the stabbing. They then went into her bedroom. According to E.R., she was with Moreno in her bedroom when they saw a car outside with its lights on. E.R. testified that she went outside, where she "saw a group of girls, and [they] got into an argument and that's when it all happened." According to E.R., there were four girls who "looked like Mexican" and were "wearing dark clothes." E.R. did not know them, but they knew Moreno's name and E.R.'s name. When the girls asked for Moreno, E.R. became "mad and upset." The argument escalated into "a big fight." E.R. did not know that she had been stabbed until she went back to her room and "felt something on [her] stomach."

Initially, E.R. did not think that her injury was significant because her stomach was bleeding only a little bit and she did not feel any pain. However, a few minutes later, her stomach started hurting, and then "it was like squirting blood all over the place." E.R. testified that Moreno wanted to take E.R. to the hospital, but she refused to go. E.R. said that she was afraid that if she called the police, there would be retaliation from the girls.

E.R. also recounted that at some point, D.C. came into the bedroom and asked E.R. whether she was okay, and she said "no." D.C. indicated that she was going to call the police or E.R.'s sister, but E.R. told her not to do so.

3. The police investigation

Escondido Police Officer Moshe Santini received a dispatch call just after 10:00 p.m. and responded to the apartment complex where D.C. and E.R. were living. Police

ordered Moreno to come out of the apartment. After several minutes, Moreno came outside.³

E.R. was taken to the hospital at approximately 11:00 p.m. She had suffered a single stab wound to her abdomen, to the left of her belly button. Although the wound was deep enough to have entered E.R.'s abdominal cavity, doctors did not find any serious injuries inside her abdomen.

Officer Kristina Adame testified that when E.R. was asked where she had been when she was stabbed, E.R. had indicated that she had been injured while inside the apartment. However, E.R. later changed her story and claimed that she had been "jumped by three girls" outside of the apartment. In addition, at one point an officer asked E.R., "[W]hat did he cut you with?" E.R. responded, "I don't know, with a knife." When police attempted to question E.R. at the hospital, before she went into surgery, she did not provide many details, and was "being very much vague and kind of avoiding [the officer's] questions."

Officer Santini investigated the site where E.R. indicated that the altercation with the unknown girls had occurred. Typically, one would expect to find blood at the scene of a stabbing. However, Officer Santini thoroughly checked the area and found no blood, no broken items or hedges, and no "torn-up dirt or torn-up grass that would be possibly caused during a fight."

³ E.R. testified that Moreno was helping her and that is why he took several minutes to leave the apartment.

At trial, the parties stipulated that E.R. had provided the following testimony at the preliminary hearing:

"[Prosecutor]: Where did you get into an argument with these girls?

"[E.R.]: In my apartment.

"[Prosecutor]: In your apartment or outside?

"[E.R.]: Apartment complex.

"[Prosecutor]: Where in the apartment complex were you?

"[E.R.]: Outside. Like I had gone outside like to the door to check who was out there and, yeah, there was a couple of girls that were there. And I don't know, they went looking for me, what it seemed like. I had never seen those girls, so."

Moreno presented no additional evidence in his defense.

B. Procedural background

The San Diego County District Attorney filed an information charging Moreno with corporal injury to a spouse (Pen. Code,⁴ § 273.5, subd. (a)). The information also alleged that in committing the offense, Moreno had caused great bodily injury (§ 12022.7, subd. (e)) and that he had used a deadly or dangerous weapon (§ 12022, subd. (b)(1)). The information further alleged that Moreno had suffered two prior convictions that were both serious felony priors (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) and strike priors (§§ 667, subds. (b)–(i), 1170.12, 668).

A jury found Moreno guilty as charged in the information, including finding true the enhancement allegations that Moreno personally inflicted great bodily injury on the victim (§12022.7, subd. (e)) and that in the commission of the offense Moreno personally used a deadly or dangerous weapon (§12022, subd. (b)(1)). In a bifurcated proceeding,

⁴ All further statutory references are to the Penal Code unless otherwise indicated.

Moreno admitted having suffered a prior serious felony conviction and a prior strike conviction.

While the proceedings were ongoing in this matter, Moreno suffered convictions for two additional offenses—unlawfully taking and driving a vehicle (Veh. Code, § 10851, subd. (a)) and recklessly evading an officer (Veh. Code, § 2800.2, subd. (a)).

The trial court sentenced Moreno with respect to both cases on December 11, 2017. The court sentenced Moreno to a total term of 17 years eight months in prison. The trial court imposed a three-year term with respect to the conviction for corporal injury to a spouse, which the court doubled to a six-year term, due to Moreno's strike conviction. The court also imposed a low term of three years with respect to the great bodily injury enhancement and one year for the deadly or dangerous weapon enhancement. Finally, the court imposed a mandatory five-year term for the serious prior conviction, resulting in a total term of 15 years on this case.⁵

Moreno filed a timely notice of appeal.

III.

DISCUSSION

A. Substantial evidence supports the jury's verdict

Moreno contends that there is insufficient evidence to support his conviction.

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. ' "The proper test for determining a claim of insufficiency of evidence in a

⁵ The court sentenced Moreno to an additional 32 months on the other case, making the total sentence 17 years eight months in prison.

criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" ' [Citations.] [¶] ' "Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" ' " (*People v. Smith* (2005) 37 Cal.4th 733, 738–739.)

" 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citation.] Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585.)

The parties disagreed as to whether appellant stabbed E.R. in the bedroom, or rather, a group of girls stabbed E.R. outside the apartment. Moreno presents a number of arguments seeking to discredit D.C. and support his defense. But these challenges to D.C.'s testimony were presented at trial and resolved by the jury; Moreno's argument overlooks that, in reviewing a sufficiency of evidence claim, this court does not reweigh

the evidence and must draw all reasonable inferences in support of the judgment.

(*People v. Zamudio* (2008) 43 Cal.4th 327, 357–358.)

A review of the record demonstrates that there is substantial evidence to support the jury's verdict. That E.R. was stabbed was not in dispute. Rather, the main dispute at trial was whether Moreno stabbed E.R. while they were in her bedroom, or rather, a group of unknown "girls" stabbed E.R. while E.R. was outside of the apartment. On this point, the jury was entitled to credit all of D.C.'s testimony, including her contention that she believed that E.R. never left her bedroom that night. The apartment was not large, and the door to the patio was open; D.C. heard no commotion or anything resembling an altercation occurring outside the apartment that night. In addition, D.C. testified that when D.C. entered E.R.'s bedroom, E.R., herself, indicated that Moreno was the person who stabbed her. D.C. was a neutral witness and had no motive to lie.

The jury was also entitled to reject E.R.'s explanation as to what occurred. Although the jury would have been able to assess E.R.'s credibility and decide to reject her trial testimony even in the absence of other evidence, in this case there was additional evidence that supported D.C.'s testimony and contradicted E.R.'s testimony. First, E.R. initially told responding law enforcement officers that she had been stabbed *while she was inside the apartment*, thereby contradicting her later statements that she had been stabbed by someone in a group of unknown females while outside the apartment. In addition, no blood was found outside of the apartment. Nor was there any indication that an altercation had taken place in the area that E.R. identified as the location of her fight

with at least three other people.⁶ In sum, D.C.'s credibility, as a neutral witness, and her consistent statements about what she had witnessed and heard, provided more than sufficient evidence to support the jury's verdict, but in addition, there was other evidence that bolstered D.C.'s version of events and contradicted the version of events that E.R. attempted to put forth at trial.

Although Moreno spends a great deal of time in his briefing on appeal attempting to undermine or discredit D.C.'s testimony, it is clear that defense counsel challenged D.C.'s version of events at trial and the jury nevertheless believed her. Given the state of this record, we reject Moreno's reliance on other cases in which courts have reversed defendants' convictions on the ground of insufficient evidence. (See *People v. Lara* (2017) 9 Cal.App.5th 296, 316–317, 319; *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 837–849.) In this case, there is abundant evidence that Moreno was the perpetrator of the offense. Moreno is asking this court to re-weigh the evidence presented at trial and to reassess the credibility of the witnesses; that is not our function. The jury was entitled to assess and weigh the evidence, to make credibility determinations, and to draw reasonable inferences from the evidence presented. The jury determined that Moreno is the person who stabbed E.R. Our role is to determine whether sufficient evidence

⁶ Moreno also suggests that E.R. never named him, specifically, as the person who stabbed her. He contends that D.C. merely "assumed" that he was the one who had stabbed E.R., since D.C. had not heard anyone leave and she knew that Moreno was in the apartment. However, E.R.'s trial testimony about the stabbing does not implicate any other male. E.R. testified that she had been stabbed by "girls." The only reasonable inference is that when E.R. told D.C. that "he" had stabbed her, she was referring to Moreno, the only man who had been present in the apartment that night.

supports the jury's determination. There is clearly sufficient evidence to support the jury's verdict.

B. *The trial court did not misunderstand its discretion with respect to the section 12022.7, subdivision (e) and section 12022, subdivision (b)(1) enhancements*

Moreno contends that remand for resentencing is necessary because, he asserts, the record demonstrates that the trial court misunderstood its discretion to strike one or both of the enhancements (i.e., the section 12022.7, subdivision (e) and section 12022, subdivision (b)(1) enhancements), pursuant to section 1385.

1. *Additional background*

At the sentencing hearing, defense counsel requested that the court strike appellant's prior strike conviction and sentence him to the low term.

The prosecutor responded that even though Moreno's prior strike conviction was ten years old, Moreno had been in custody up until a few months before he committed the current offense. The prosecutor noted Moreno's propensity for violence and his inability to remain law abiding. The prosecutor was surprised that the probation department had recommended a middle term sentence rather than the upper term. The prosecutor asked the court to impose the upper term on the domestic violence conviction, adding, "I think if the court has any wiggle room or wants to give some sort of break or leniency towards Mr. Moreno, it should be in the GBI allegation only because, thankfully, [the victim] ended [up] being okay."

The trial court indicated that it agreed with the prosecutor that the circumstances in aggravation justified an aggravated term, but then stated that the court would not

deviate from the probation report's recommended middle term sentence. The court added, "But I agree also with [the prosecutor], that the wiggle room I've got actually comes somewhat in the GBI and other than that I can reduce that -- even though I can't necessarily justify it by mitigating factors, other than the fact that he's now a father, reduce that to the low term of three." The trial court denied appellant's request to strike his prior strike conviction.

The trial court ultimately imposed a three-year term with respect to the conviction for corporal injury to a spouse, which the court doubled to a six-year term, due to Moreno's strike conviction. The court imposed a low term of three years with respect to the great bodily injury enhancement, one year for the deadly or dangerous weapon enhancement, plus a mandatory five-year term for the serious prior conviction, for a total term of 15 years on this case. Moreno challenges the court's decision to impose the three-year great bodily injury enhancement and the one-year deadly or dangerous weapon enhancement, arguing that the court did not understand that it had discretion to strike those enhancements.

2. *Analysis*

As an initial matter, the People point out that Moreno has forfeited this argument because defense counsel never raised this issue at sentencing. (See *People v. Scott* (1994) 9 Cal.4th 331, 351.) Although it does appear that Moreno's contention has been forfeited, we nevertheless address the merits of that claim in light of his alternative argument that defense counsel rendered ineffective assistance by failing to raise this sentencing issue with the trial court. (See *People v. Williams* (1998) 61 Cal.App.4th 649,

657 [addressing the merits of a claim, despite its forfeiture, because defendant asserted ineffective assistance of counsel].)

In order to establish that the court abused its discretion in sentencing a defendant, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978.) To meet this burden, the defendant must "affirmatively demonstrate that the trial court misunderstood its sentencing discretion." (*People v. Davis* (1996) 50 Cal.App.4th 168, 172.)

Where the "record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] . . . ' *If the record is silent*, however, the defendant has failed to sustain his burden of proving error, and we affirm. [Citation.]" (*People v. Lee* (2017) 16 Cal.App.5th 861, 866–867, italics added.)

The trial court's statements at the sentencing hearing do not affirmatively show that the court misunderstood or otherwise failed to exercise its discretion in striking the enhancements.

It is well established that a "trial court is presumed to have been aware of and followed the applicable law" (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496 (*Mosley*))

and that a "judgment or order of the lower court is presumed correct[, and a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*In re Julian R.* (2009) 47 Cal.4th 487, 498–499, internal citations and quotations omitted.) "These general rules concerning the presumption of regularity of judicial exercises of discretion apply to sentencing issues." (*Mosley, supra*, at p. 496; see also *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527 ["[W]e cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of [its sentencing] discretion"].) This record does not affirmatively show that the trial court was unaware of or misunderstood the scope of its discretion. The judgment should be presumed correct.

The prosecutor advocated for an upper term sentence and suggested that if the court wanted to show appellant leniency, "it should be in the GBI allegation only" because the victim "ended[up] being okay." For that reason, he suggested the middle term on the GBI enhancement. The trial court agreed with the prosecutor that it could reduce the sentence on the great bodily injury enhancement, and opted to impose the low term rather than the middle term suggested in the probation report. In doing so, the court stated, "[E]ven though I can't necessarily justify it by mitigating factors, other than the fact that he's now a father"

The trial court's statements do not demonstrate that it was unaware of its discretion to strike the enhancements for causing great bodily injury and personally using a deadly or dangerous weapon. Taken in context, the trial court's statement that it could reduce the great bodily injury enhancement to the low term was not intended as a statement of the

extent of its possible discretion, but rather, an acknowledgement of one possible manner in which the court could exercise its discretion. The trial court's statements do not indicate ignorance of its authority to strike the challenged enhancements.

B. *Moreno is entitled to have the trial court exercise its discretion as to whether to impose or strike the five-year prior serious felony enhancement under a new provision of law*

On September 30, 2018, the Governor signed S.B. 1393, which became effective on January 1, 2019. S.B. 1393 amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony enhancement for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) Under the previous versions of these statutes, the trial court was *required* to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a)(1)). The court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667" (former § 1385, subd. (b)).

Moreno contends that S.B. 1393 applies retroactively to all cases or judgments of conviction in which a five-year enhancement term was imposed at sentencing based on a prior serious felony conviction, provided the judgment of conviction was not final at the time S.B. 1393 became effective on January 1, 2019, and that a remand for a new sentencing hearing is therefore required. The People concede the issue and agree that the new law applies to Moreno's case because his judgment was not final at the time the law went into effect.

In *People v. Garcia* (2018) 28 Cal.App.5th 961 (*Garcia*), another division of this district agreed with the position taken by both Moreno and the People in this appeal, and held that "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [S.B.] 1393 becomes effective on January 1, 2019." (*Id.* at p. 973.) We agree with the *Garcia* court's analysis, as well as its conclusion. We thus accept the People's concession that the amendments to S.B. 1393 apply retroactively to Moreno's case and entitle him to resentencing. Remand is therefore appropriate to allow the trial court to resentence Moreno and to exercise its new discretion with respect to whether to strike the five-year prior serious felony enhancement.⁷

⁷ We do not intend to suggest that the trial court should exercise its discretion to strike the enhancement at issue here; we make no comment as to the propriety of such a decision. We remand solely to allow the trial court the opportunity to exercise its discretion.

IV.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated, and the matter is remanded for resentencing. Upon resentencing, the court shall consider whether to exercise its discretion to strike Moreno's prior serious felony enhancement.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.